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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 962, 963, 980.
(October Term, 1940.)

MARTIN M. GOLDMAN, JACOB P. SHULMAN and THEODORE GOLDMAN, *Petitioners*,

against

UNITED STATES OF AMERICA.

BRIEF FOR THOMAS H. ELIOT, AMICUS CURIAE.

THOMAS H. ELIOT,
Amicus Curiae.

January 14, 1942.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF INTEREST.

This brief is submitted to the Court by a citizen of the United States who, as a member of a Committee of Congress which has dealt with this subject, has had the opportunity to observe and study facts which bear upon the constitutionality of wire-tapping, detectaphoning, and the like.

The effect of such practices upon persons and groups, the immensity of their application, their lack of utility, and the dangers inherent in them have often been described generally. It is submitted, however, that any estimate of the problem should consider the numerous facts which have been elucidated within the last year by legislative investigation. The submission of this brief is conceived to be the duty of a citizen who has participated in the hearings and debates on the question.

Point I.

The interception of even one end of a telephone conversation, whether by means of a detectaphone or other device, is forbidden by the Federal Communications Act (Act of June 19, 1934, c. 652, sec. 605, 47 U. S. C., sec. 605).

Unlike some of the state statutes forbidding wire-tapping,[1] the federal statute does not employ terms prohibiting only physical interposition on the telephone line. The statute uses the general word "intercept" for the reason that it is intended to have general application to all cases of unauthorized abstraction of messages from the specified channels of communication. Since the statute applies to radio, as well as to telephone and telegraph communication, the word "intercept" must be allowed a meaning broad enough to cover the method by which radio communications are received, namely, without any physical contact between transmitter and receiver.

Nor does the applicability of the statute depend upon the interception of both ends of a conversation. The language of the statute is "communication," intentionally chosen, as was the word "intercept," to cover radio and telegraph, as well as telephone messages. Any part of the words transmitted through the channel of communication is a "communication" and as such, protected by the statute.

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[1] See, for example, N. Y. Penal Law, sec. 1423, which makes it a crime to "unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument."

The construction that both ends of a telephone conversation must be obtained before the statute can apply is precluded by the provision of the statute that "no person . . . having become acquainted with the . . . purport" of a communication "or any part thereof" may divulge even the "existence" of the communication.

Point II.

The interception of conversation, telephonic or non-telephonic, by means of a detectaphone or any other device is unconstitutional. This case presents, as no previous case before this Court has, a combination of two kinds of official espionage, wire-tapping and detectaphone interception. It is fortunate that the circumstances combine both types, because they are intrinsically one and the same thing from the constitutional point of view and they have often been interrelated in the practices of law enforcement officers. Instruments used to tap wires today will just as easily intercept non-telephonic conversations, while the newest mechanized interceptors will automatically record either one or both ends of telephone conversations if they are placed in certain positions. For example, the device recently used by the Federal Bureau of Investigation to tap the telephone conversations of a labor leader[2] includes a microphone which, in addition to the interception of messages passing over the telephone circuit, picks up all conversation in the immediate vicinity.

The newer developments in mechanized interception emphasize the words of Mr. Justice Brandeis in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438 (1928) when, with the concurrence of the present Chief Justice, he issued this prophetic warning:

> ": . . But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become avail-

[2] Memorandum of Decision of Presiding Inspector in The Matter of Harry Renton Bridges, Government Printing Office, 1941, p. 183.

able to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

"Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been but of what may be.' The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?" (Pages 473-474)

Fundamentally, the question in this case is whether the guaranties against unwarranted search and seizure are to remain effective in an age of mechanical invention. If by the use of new devices the government can invade the privacy and gain knowledge of the confidential communications of the most cautious citizen, the constitutional protection loses virtually all its force and meaning.

The same question was an underlying issue in the *Olmstead* case, *supra*, but is presented much more sharply and insistently today. Invention has proceeded apace: in the case at bar, for instance, an instrument was used which could pick up conversations in a different room, through a thick wall.[3]

In outlawing wire-tapping in 1934 (Federal Communications Act, *supra*, sec. 605), and in rejecting a recent bill to legalize it, Congress considered the effect of the practice,

[3] Record on Appeal, Vol. I, p. 101.

on the privacy of the citizen. And, as Mr. Justice Roberts said in *Nardone* v. *United States*, 302 U. S. 379 (1937), at 383: "The same considerations may well have moved the Congress to adopt Sec. 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments."

The objections of four dissenting justices in the *Olmstead* case to mechanized interception are now strengthened by the facts which have since been brought to light, particularly in the consideration of legislative proposals. Since the decision in the *Olmstead* case, fourteen measures dealing with mechanized interception were introduced in Congress: between 1929 and 1932 it was the subject of eight bills which sought to abolish it;[4] it was first forbidden in 1933, in a restriction on the use of funds by one federal agency;[5] it is presently illegal by operation of section 605 of the Federal Communications Act, requested by the Administration and drafted as a measure to provide for unified regulation of the communications industry;[6] since then, four bills have been introduced to authorize mechanized interception by federal agents,[7] but none of them has been enacted into law; the most recent was defeated in the House of Representatives on June 30, 1941. The subject has recently been considered in hearings before three subcommittees of the Senate and one subcommittee of the House of,

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[4] H. R. 4139, 71st Cong., 1st Sess., June 19, 1929; H. R. 5416, 71st Cong., 1st Sess., Nov. 21, 1929; Amendment to S. 3344, 71st Cong., 3rd Sess., Feb. 4, 1931; S. 6061, 71st Cong., 3rd Sess., Feb. 5, 1931; H. R. 23, 72nd Cong., 1st Sess., Dec. 8, 1931; H. R. 5305, 72nd Cong., 1st Sess., Dec. 10, 1931; S. 1396, 72nd Cong., 1st Sess., Dec. 10, 1931; H. R. 9893, 72nd Cong., 1st Sess., Feb. 27, 1932.

[5] 47 Stat. 1381, Act of Mar. 1, 1933.

[6] Act of June 19, 1934.

[7] S. 3756, 75th Cong., 3rd Sess., 1938 (see remarks of United States Senator Robert F. Wagner in Revised Record of New York State Constitutional Convention, 1938, Vol. I, pp. 559-562; H. J. Res. 571, 76th Cong., 3rd Sess., 1940; H. R. 2266, 77th Cong., 1st Sess., 1941; H. R. 3099, 77th Cong., 1st Sess., 1941.

Representatives,[8] in reports of two subcommittees of the Senate,[9] and in a full dress debate in the House.[10]

Some of the facts thus made available are:

(1) Mechanized interception invades the privacy of numberless innocent and unsuspected persons, many times the number of those whose communications are the avowed object of such interception by police. The dragnet character of this process distinguishes it from the ordinary physical search of premises and seizure of papers, and from other types of search and seizure.

The records and testimony leading to these conclusions constitute an after-acquired footnote to one of the most important statements in the dissenting opinion of Mr. Justice Brandeis—and emphasize to what an extent that opinion understated the evil. He said:

> ". . . Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of

[8] Hearings on S. 1253, before subcommittee of Committee on Interstate Commerce, U. S. Senate, 77th Cong., 1st Sess., 1941; Hearings pursuant to S. Res. 224, before subcommittee of Committee on Interstate Commerce, U. S. Senate, 76th Cong., 3rd Sess., 1940-1941; Hearings on nomination of Francis Biddle as Attorney General, before subcommittee of Committee on the Judiciary, U. S. Senate, 77th Cong., 1st Sess., 1941, not printed; see also New York PM, Sept. 4, 1941, pp. 12-13. Hearings on H. R. 2266, before Subcommittee No. 1 of Committee on the Judiciary, U. S. House of Representatives, 77th Cong., 1st Sess., 1941.

[9] Senate Report No. 1304, 76th Cong., 3rd Sess., Mar. 12, 1940 and unnumbered report of subcommittee of Committee on Interstate Commerce, pursuant to S. Res. 224, 77th Cong., 1st Sess., to Chairman, July 22, 1941.

[10] Debate on H. R. 2266, 87 Cong. Rec., unbound, 5877-5912, *passim*, 77th Cong., 1st Sess., June 30, 1941. It was also briefly debated on Aug. 6, 1940, 86 Cong. Rec., unbound, 15194-15198, 76th Cong., 3rd Sess.

assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."

The same observation may be made with reference to the interception of non-telephonic conversation. While the device is in use, all sounds within a given radius will be heard and recorded. When the vicinity of the detectaphone is frequented by others than the intended victim, they automatically become unintended victims.

In support of Mr. Justice Brandeis and the present Chief Justice, this Court can turn to its own records. The interceptors whose work the Court condemned in *Weiss* v. *United States*, 308 U. S. 321 (1939), made mechanical recordings of thousands of conversations. Record on appeal, pp. 74-83. And those whose work the Court nullified in *Nardone* v. *United States*, 302 U. S. 379 (1937), tapped the wires of public telephone booths in a large New York City hotel and listened to thousands of conversations, only 85 of which they found useful or worth recording. Record on appeal, p. 186.

Witness after witness appearing before Subcommittee No. 1 of the House Judiciary Committee testified on this point.[11] Nor did any witness who urged the legalization of mechanized interception deny that it entrains a dragnet spying on innocent and unsuspected persons, or present any contrary testimony on this point.

(2) Mechanized interception is not so necessary, so useful or even (from the viewpoint of police authorities) so desirable in the detection of crime as to constitute justification for the searches and seizures effected thereby, whether

[11] Hearings on H. R. 2266, *supra* note 8, at pp. 51, 62, 76, 82, 92, 101-103, 162-164, 176, 183, 210, 215, 231-233. Testimony taken by the House Judiciary Committee, subsequent to the hearings before its Subcommittee No. 1, was not recorded and is therefore not available for citation. Press reports of the testimony, on this point, of the Chairman of the Federal Communications Commission and Defense Communications Board, may be found in St. Louis Post-Dispatch and Baltimore Sun of March 26, 1941.

against unsuspected persons, those suspected but innocent, or those who are guilty.

Undoubtedly, in isolated cases, evidence of guilt can be secured by means of mechanized interception. There may even be cases where such evidence would not be otherwise obtainable. But, viewing crime detection in general, one finds that such interception does not serve its avowed purpose of catching criminals. This is particularly important since the practice serves other purposes, of an altogether different nature.

As to the utility of this investigative technique, reference may be made to two illustrative items appearing in the testimony before the House Judiciary Subcommittee on the 1941 bill to legalize wire-tapping. One item is the statement of J. Edgar Hoover on February 9, 1940, after he had served as head of the Bureau of Investigation for 16 years. He declared that such mechanized interception is an "archaic and inefficient" practice which "has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique."[12]

With special reference to the question of the utility of the practice in the apprehension of spies and saboteurs, there was testimony before the House subcommittee by a man who had served several government departments during the World War that it was completely ineffectual:[13]

> "In all of the espionage cases—and I kept up with them during the war—I do not recall a single lead or a single spy trapped through telephone tapping. . . . I do not recall a single instance—and Mr. Holtzoff can correct me if I am wrong—where they found any spying work, any sabotage in the last war as a result of using a procedure of this kind."

Mr. Alexander Holtzoff, who attended the hearings as a representative of the Department of Justice, did not con-

[12] Wire Tapping and Law Enforcement, 53 Harv. L. Rev. 863, 870*n* (1940).

[13] *Supra* note 11, p. 168.

tradict this statement. Indeed, when Representative Barnes asked Mr. Holtzoff for information as to the utility of the practice in espionage and sabotage cases during the last war, the reply was, "I do not know. I have no general idea." Representative Barnes declared:[14]

> "We had a similar situation facing the country to the one we have now, only the next step further, and in the midst of that very proceeding, or situation, wire tapping was prohibited; therefore the conclusion must have been that it was not an effective means of running down saboteurs and the like, and helping the Government ferret out those types of individuals."

No facts were introduced to shake this conclusion.[15]

(3) Serious abuses are inherent in the use of such devices, even by the police.

A formal statement by the Department of Justice on March 15, 1940, stated that[16]

> ". . . the discredit and suspicion of the law-enforcing branch which arises from the occasional use of wire tapping more than offsets the good which is likely to come to it. . . ."

The same statement quoted Mr. Hoover as follows:

> "While I concede that the telephone tap is from time to time of limited value in the criminal investigative field, I frankly and sincerely believe that if a statute of this kind were enacted the abuses arising therefrom would far outweigh the value which might accrue to law-enforcement as a whole."

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[14] *Ibid.*, p. 242.

[15] A study of the reported cases, both federal and state, reveals not a single case of apprehension of a spy or a saboteur through the use of mechanized interception. The ineffectuality of the practice was testified to by several witnesses before the subcommittee. *Ibid.*, pp. 152, 166, 168, 184.

[16] *Ibid.*, pp. 223-224.

The testimony before the House Judiciary subcommittee includes the text of an interview with Mr. Hoover, reporting his view that any considerable resort to this practice would make crooks out of his detectives in no time.[17]

The testimony in the Judiciary Committee hearings points to some of the abuses incident to mechanized interception—abuses which may even be the principal end served thereby.[18]

(4) Mechanized interception is a favorite political weapon.

There was testimony before the subcommittee that, with the institution of mechanized interception as a lawful police technique, incumbent administrations would use the practice against political parties and individuals of the opposition—and that politicians would use it against each other to obtain material for mud-slinging campaigns.[19] That these are not idle fears is borne out by the record.

Detectives employed by the Governor of Rhode Island have tapped the wires of the attorney general of that state and of the mayor of one of its cities.[20] Mechanized interception has been used against Democratic Party leaders in Philadelphia.[21] Microphones have been planted in the office of the Governor of Colorado[22] and the bedroom of the Speaker of the California Assembly.[23]

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[17] *Ibid.*, p. 68.

[18] *Ibid.*, pp. 34, 48, 59, 65, 76-97, 101, 115, 133-134, 164, 176, 200-201, 214-217, 223, 230.

[19] *Ibid.*, p. 113 *et seq.*

[20] Hearings on wire tapping, pursuant to S. Res. 224, before a subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 3rd Sess., 1940, Part 1, pp. 3-31. For a somewhat similar incident involving a Governor of Pennsylvania, see Baltimore Sun, Aug. 2, 1937, p. 1, cols. 4-5.

[21] *Ibid.*, pp. 63-82.

[22] Reported in *Editor and Publisher*, Jan. 29, 1938; see also statement of U. S. Senator Edwin C. Johnson reported in Washington Post, Mar. 17, 1940.

[23] Reported in San Francisco Examiner, Mar. 6 and 8, 1940.

(5) Mechanized interception is one of the established methods of anti-labor spying.

In August, 1941, government agents installed a microphone in the room of a labor leader and overheard conversations between him and other labor leaders.[24] Hearings conducted by the National Labor Relations Board have revealed the use of wire-tapping against employees of the Dallas plant of the Ford Motor Company[25] and against the Oil Workers International Union.[26] The files of the Federal Communications Commission record the use of a microphone against the Teamsters Union in California.[27] An affidavit filed with the LaFollette Committee charges tapping of the wires of the Automobile Workers Union and its president.[28] The record of that committee also shows the use of detectaphones against Remington Rand strikers[29] and demonstrates that detectaphones and other intercepting devices are sold by the salesmen of tear gas, the other notorious anti-labor commodity.[30]

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[24] *Supra* note 2; see also New York PM, Aug. 25, 26, 28 and 29, 1941.

[25] Report of National Labor Relations Board Trial Examiner in *Ford Motor Co. v. International Union of United Automobile Workers, et al.* (1940); see also N. Y. World-Telegram, Apr. 20, 1940, p. 2, col. 2.

[26] Hearings before National Labor Relations Board in *Midcontinent Petroleum Company v. Oil Workers International Union* (1940); see also 86 Cong. Rec., unbound, 4759-4761, 76th Cong., 3rd Sess., Mar. 19, 1940; Tulsa Daily World, Mar. 28, 29 and 31, 1940.

[27] Hearings on Violations of Free Speech and Rights of Labor, pursuant to S. Res. 266, before a subcommittee of the Senate Committee on Education and Labor, U. S. Senate, 76th Cong., 3rd Sess., Part 58, 1940, pp. 21446, 21448-21449, 21666-21667. The microphone was connected to a radio transmitter which broadcast the intercepted words to the receiving apparatus of the eavesdropper and to anyone else who happened to tune in on that frequency. The interception was discovered when a third party, who accidentally tuned in on the proper frequency, notified both the victim and the Federal Communications Commission.

[28] *Ibid*, Part 6, 1937, p. 2106.

[29] *Ibid.*, Part 8, 1937, pp. 2734, 2736.

[30] *Ibid.*, Part 2, 1936, pp. 434-435.

These examples, perhaps, are sufficient reason for the fear of and opposition to wire-tapping expressed by organized labor. The legalization of the practice in any form and with whatever "safeguards" could be devised was vehemently opposed in the hearings by a solid bloc of unions consisting of the American Federation of Labor,[31] the Congress of Industrial Organizations,[32] and the Railroad Brotherhoods.[33]

(6) Mechanized interception is a grave obstacle to the proper conduct of the affairs of professional and business men. Testimony before the House subcommittee, by men drawn from the bar and the business world, clearly states what they conceive to be the dangers to them.[34] Their experience justifies their apprehensions.

A member of the bar testified:[35]

> "If any agency wanted to detect crime, and wanted to get information which would be useful in detecting that crime, why do they not tap the wires where there is a conversation between a lawyer and his client, and why do they not put a dictaphone in jail where the lawyer is consulting his client? There they would get the absolute information revealed by the client to his lawyer. But, no, our conscience is shocked at that."

Consciences are not always troublesome, however, for in Washington, D. C., the conversation of an attorney with an arrested client, held in a prison cell, was intercepted by police who had placed a dictograph in the cell.[36] Two men

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[31] *Supra* note 11, p. 34 *et seq.*

[32] *Ibid.*, pp. 75 *et seq.*, 84 *et seq.*, 177 *et seq.*

[33] *Ibid.*, pp. 90 *et seq.*, 100 *et seq.*

[34] *Ibid.*, pp. 35 *et seq.*, 151 *et seq.*, 228 *et seq.*

[35] *Ibid.*, p. 45.

[36] Washington Post, Dec. 8, 1940, p. 8, col. 1.

The protection afforded by the law to confidential communications which pass between lawyer and client is rendered comparatively valueless if the law is to permit the mechanized interceptor to intervene, for the privilege does not bar the testimony of third persons. *U. S. v. Olmstead*, 7 Fed. (2nd) 760, 763 (D. C. Wash. 1925).

have recently been indicted by a grand jury for placing a dictograph in a room used for conferences by a rival business organization.[37] Some years ago, the telephones of an association of milk producers in Ohio were tapped in the course of a "price war".[38] A public utility company subjected to mechanized intereeption the attorneys of its opponents in a lawsuit.[39] In New York, two attorneys were indicted on a charge of tapping the wires of opposing counsel.[40]

(7) The prevalence of mechanized interception may constitute a threat to the defense of the country.

Numerous witnesses before the House subcommittee described the dangers to defense inherent in the practice and recalled that, during the last war, Congress had found it necessary to enact a law [41] absolutely forbidding it.[42] According to reports in responsible journals, the Chairman of the Federal Communications Commission and the Defense Communications Board testified in executive session before the House Judiciary Committee in March 1941 that the use of mechanized interception hinders and endangers the national defense program.[43] The result of the practice, he said, is that officers engaged in the national defense must virtually forego the use of the telephone lest vital secrets

[37] N. Y. Times, Dec. 6, 1941, p. 19, col. 7.

[38] N. Y. Times, Sept. 25, 1932, p. 2, col. 2.

[39] Hearings, *supra* note 20, Part 3, 1941, pp. 1009-1049, 1054-1061.

[40] N. Y. Times, Jan. 26, 1939, p. 14, col. 5; Feb. 1, 1939, p. 2, col. 2; Feb. 8, 1939, p. 2, col. 2.

[41] 40 Stat. 1017 (1918).

[42] *Supra* note 11, pp. 61-62, 77, 79, 87-88, 145, 146, 183-184.

[43] The testimony of Chairman Fly was not printed in the record, but it was reported by the press. See articles by Paul Ward, Baltimore Sun, Mar. 26, 1941; T. L. Stokes, Scripps-Howard newspapers, Mar. 27, 1941; M. W. Childs, St. Louis Post-Dispatch, Mar. 26, 1941; Nathan Robertson, New York PM, Mar. 27, 1941.

fall into the hands of unauthorized federal agents.[44] He pointed out, also, the existence of a Navy Department regulation warning naval officers to be careful in using telephones. His testimony also recalled the Congressional prohibition of wire-tapping during the last war.

In a letter on March 27, 1941,[45] the Chairman of the Interstate Commerce Commission quoted the Commission's Director of the Bureau of Safety as follows:

> "The railroads use telephone and telegraph wires for the transmission of train orders. This constitutes the most important method of communication for directing the movement of trains accurately, safely and promptly. These wires vary in the effectiveness of operation and performance, depending upon construction and maintenance. Any additional connection of a wire-tapping character to a dispatching circuit would form a source of possible trouble which might interfere with proper transmission and receipt of orders, which in turn may lead to traffic delay and congestion, and resulting hazards."

The executive secretary-treasurer of the Railway Labor Executives Association, for many years a train dispatcher and president of the Train Dispatchers' Association, told the same subcommittee that the mechanical interference with the 1,200,000 miles of railroad communication wires

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[44] See *United States* v. *Gruber*, 39 Fed. Supp. 291 (S. D. N. Y. 1941), involving the tapping of wires of the Securities and Exchange Commission.

The Associate Director of the Office of Production Management told a committee investigating the national defense program:

> "* * * the biggest part of our business is done on the telephone, both with the services and between the Departments themselves. I have a private line to Secretary Knox and Secretary Stimson right in my office; all I have to do is lift up the telephone and talk to them * * *". (Hearings before Special Committee Investigating the National Defense Program, pursuant to S. Res. 71, U. S. Senate, 77th Cong., 1st Sess., 1941, Part 1, p. 107.)

[45] This letter was placed on file in hearings before the House Rules Committee on H. R. 2266, 77th Cong., 1st Sess., 1941.

which is produced by the use of intercepting devices may "cause loss of lives or train wrecks. No one intent on committing sabotage could do a worse act." [46] He pointed out, also, that the railroad communication wires are interconnected with the commercial lines and are likely to be affected by interference at any point.[47] The Telegraph and Telephone Section of the Association of American Railroads recently announced that the telephone is rapidly supplanting the telegraph in rail traffic control because of the transmission of messages "with greater ease and in less time." [48] The Association's director of public relations has announced the "need to guard all of our lines of communication with particular care during the present emergency . . . because misuse of the various forms of communication can produce serious and sometimes tragic results." [49] The Chairman of the Association's Telegraph and Telephone Section declared that "fast and adequate communication is more imperative today than ever" and he called for "the prevention of every delay possible." [50]

Even in the absence of many of the foregoing facts this Court thrice condemned mechanized interception. *Nardone* v. *United States*, 302 U. S. 379 (1937); *Weiss* v. *United States*, 308 U. S. 321 (1939); *Nardone* v. *United States*, 308 U. S. 338 (1939).

This decision in the first *Nardone* case, *supra*, was characterized by the Court, through the opinion of Mr. Justice Frankfurter in the second *Nardone* case, as "not the product of a merely meticulous reading of technical language", but rather "the translation into practicality of broad considerations of morality and public well-being." 308 U. S. 321, 340.

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[46] *Supra* note 11, pp. 91-92.

[47] *Ibid.*, pp. 98-99.

[48] Fairmont *Times-West Virginian*, Oct. 12, 1941.

[49] N. Y. Journal of Commerce, Sept. 24, 1941.

[50] *Id.*

The force of the foregoing facts, it is submitted, is such as to call for a reexamination of the question of constitutionality of mechanized interception and the overruling of the majority decision in *Olmstead* v. *United States*, *supra*.

The meaning of the Fourth and Fifth Amendments was thus expressed by Mr. Justice Brandeis in his dissent in the *Olmstead* case:

> ". . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." 277 U. S. 438, 478-479.

The decision below is based upon a finding that no trespass was involved in the use of the detectaphone (*United States* v. *Goldman*, 118 Fed. [2d] 310, 314 [C. C. A. 2, 1941]) and the government relies upon this finding in its claim that there was no search within the meaning of the Fourth Amendment. Brief in opposition to Petition for Certiorari, pages 7-8. This Court has already held, however, that trespass, though it may be an aggravating circumstance, is not a necessary component of illegal search. In *Boyd* v. *United States*, 116 U. S. 616 (1886), a statute requiring production of documents, under a sanction that the government's assertions as to their contents would otherwise be taken as confessed, was called "the obnoxious thing in its mildest and least repulsive form" (page 635). None the less, it was

held unconstitutional as an illegal search and seizure. Though there was no physical entry or actual search and seizure, the statute accomplished the effect of "forcing from a party evidence against himself." Page 622. Speaking of the opinion of Lord Camden in *Entick* v. *Carrington*, 19 Howell's State Trials 1030, Mr. Justice Bradley said, at page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

The above language was quoted with approval by Mr. Justice Brandeis in the *Olmstead* case, *supra*, at pages 474-475. What the Court condemns is the element of compulsion, compulsion which need not be physical. Is the case less grave where information is obtained by means of a detectaphone than where it is ordered produced under a sanction? It may be said that if the search in the *Boyd* case was "the obnoxious thing in its mildest and least repulsive form", in the case at bar it is the obnoxious thing in a virulent and repulsive form.

The Court has also held that a search and seizure are unconstitutional where accomplished "by stealth instead of by force or coercion". *Gouled* v. *United States*, 255 U. S. 298, 305 (1921).

It is submitted that there are no grounds upon which the procedure of the officers in this case can be distinguished from an unconstitutional search and seizure. The notion sometimes expressed that searching is a function of the sense of sight [51] has been adequately dispelled. *Nueslein* v. *District of Columbia*, 115 Fed. (2nd) 690 (App. D. C. 1940), held that the defendant's statements to officers illegally on his premises were inadmissible under the Fourth and Fifth Amendments. Nor can it be maintained that only tangible and concrete things are protected against seizure. In the *Nueslein* case, *supra*, as in the case at bar, the officers seized spoken words. Mr. Justice Brandeis pointed out in the *Olmstead* case, *supra*, that the Fourth Amendment is violated by the reading of a paper "without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined . . . constitutes a violation of the Fifth Amendment." Page 478. See also *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

CONCLUSION.

It is respectfully submitted that this Court should hold that the interception of communications, telephonic or non-telephonic, by means of wire-tapping, detectaphones, microphones, dictaphones, dictographs, induction coils, or any other such device, is a violation of the Fourth Amendment and that any use of information thus obtained in any judicial proceeding is a violation of the Fifth Amendment.

THOMAS H. ELIOT,
Amicus Curiae.

January 14, 1942.

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[51] 56 C. J. 1154.

Op. 2 - 4 Dissent 1

SUPREME COURT OF THE UNITED STATES.

Nos. 962, 963, 980.—October Term, 1940.

962 Martin M. Goldman, Petitioner, *vs.* The United States of America.

963 Jacob P. Shulman, Petitioner, *vs.* The United States of America.

980 Theodore Goldman, Petitioner, *vs.* The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners and another were indicted for conspiracy[1] to violate § 29(b)(5) of the Bankruptcy Act[2] by receiving, or attempting to obtain, money for acting, or forbearing to act, in a bankruptcy proceeding. They were convicted and sentenced and the judgments were affirmed by the Circuit Court of Appeals.[3] The facts are fully stated in the opinion below and we shall advert only to those essential to an understanding of the questions open in this court.

The petitioners were lawyers. One of them, Martin Goldman, approached Hoffman, the attorney representing an assignee for the benefit of creditors, with the proposition that the assignee sell the assets in bulk for an ostensible price which would net the creditors a certain dividend, but in fact at a secret greater price, and that Hoffman and the petitioners should divide the difference between them. Hoffman refused. Shulman, one of the petitioners, then filed an involuntary petition in bankruptcy against the assignor in such form that it could be dismissed on motion and with-

[1] Criminal Code § 37; 18 U. S. C. § 88.
[2] 11 U. S. C. § 52(b)(5).
[3] 118 F. 2d 310.

out notice; and obtained a stay of the assignee's sale. The bankruptcy court refused to revoke the stay and Shulman again approached Hoffman stating that, if he agreed to the proposed arrangement, the bankruptcy petition could be dismissed and the plan consummated. Hoffman said he would agree, but he went at once to the referee and disclosed the scheme. A federal investigator was consulted and it was arranged that Hoffman should continue to negotiate with the petitioners. He did so. Numerous conferences were had and the necessary papers drawn and steps taken. Success was frustrated only by the refusal of a creditor to release for the offered percentage of his claim.

Meantime, two federal agents, with the assistance of the building superintendent, obtained access at night to Shulman's office and to the adjoining one and installed a ~~dictaphone~~ apparatus in a small aperture in the partition wall with a wire to be attached to earphones extending into the adjoining office. This was for the purpose of overhearing a conference with Hoffman set for the following afternoon. The next afternoon, one of the agents returned to the adjoining room with two others and a stenographer. They connected the earphones to the ~~dictaphone~~ but it would not work. They had with them another device, a detectaphone having a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in Shulman's office, and means for amplifying and hearing them. With this ~~apparatus~~ the agents overheard, and the stenographer transcribed, portions of conversations between Hoffman, Shulman, and Martin Goldman on several occasions, and also heard what Shulman said when talking over the telephone from his office.

Before the trial Shulman learned the facts and made a motion, in which the other petitioners joined, to suppress the evidence thus obtained. A preliminary hearing was had and the motion was denied. At the trial the evidence was admitted over objection that its receipt violated the Fourth Amendment of the Constitution and, as respects Shulman's talk into the telephone receiver, violated also § 605 of the Federal Communications Act.[4]

At the preliminary hearing, and at the trial, counsel for petitioners demanded that they be permitted to inspect the notes and memoranda made by the agents during the investigation, the agents having admitted they had refreshed their recollection from

[4] Act of June 19, 1934, 48 Stat. 1064, 1103; 47 U. S. C. § 605.

these papers prior to testifying. The trial judge ruled that the papers need not be exhibited by the witnesses.

1. We hold there was no error in denying the inspection of the witnesses' memoranda. The judge was clearly right in his ruling at the preliminary hearing, as the petitioners should not have had access, prior to trial, to material constituting a substantial portion of the Government's case.

We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.

2. We hold that the overhearing and divulgence of what Shulman said into a telephone receiver was not a violation of Section 605.

The petitioners contend that a communication falls within the protection of the statute once a speaker has uttered words with the intent that they constitute a transmission of a telephone conversation. The validity of the contention must be tested by the terms of the Act fairly construed. So considered, there was neither a "communication" nor an "interception" within the meaning of the Act. The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation. Section 3 embodies the following definition:[5]

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission.[6] Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the pres-

[5] 47 U. S. C. § 153.

[6] Compare Diamond v. United States, 108 F. 2d 859, 860; United States v. Polakoff, 112 F. 2d 888, 890.

ence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute,[7] but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. The same view of the scope of the Communications Act follows from the natural meaning of the term "intercept". As has rightly been held, this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.[8] The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room.

3. We hold that what was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry.

The petitioners' contend that the trespass committed in Shulman's office when the ~~dictaphone~~ was there installed, and what was learned as the result of that trespass, was of some assistance on the following day in locating the receiver of the detectaphone in the adjoining office and this connection between the trespass and the listening resulted in a violation of the Fourth Amendment. Whatever trespass was committed was connected with the installation of the ~~dictaphone~~. As respects ~~the dictaphone~~, the trespass might be said to be continuing and, if the ~~dictaphone~~ had been used it might, with reason, be claimed that the continuing trespass was the concomitant of its use. On the other hand, the relation between the trespass and the use of the detectaphone was that of antecedent and consequent. Both courts below have found that the trespass did not aid materially in the use of the detectaphone. Since we accept these concurrent findings, we need not consider a contention based on a denial of their verity.

4. We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.

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[7] Ex parte Jackson, 96 U. S. 727.

[8] United States v. Yee Ping Jong, 26 F. Supp. 69, 71.

In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in *Olmstead* v. *United States*, 277 U. S. 438. They argue that the case may be distinguished. The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case.

The petitioners ask us, if we are unable to distinguish *Olmstead* v. *United States*, to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this court. The views of the court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed.

The judgments are affirmed.

Mr. Chief Justice Stone and Mr. Justice Frankfurter:

Had a majority of the Court been willing at this time to overrule the *Olmstead* case, we should have been happy to join them. But as they have declined to do so, and as we think this case is indistinguishable in principle from *Olmstead's*, we have no occasion to repeat here the dissenting views in that case with which we agree.

Mr. Justice Jackson took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES.

Nos. 962, 963, and 980.—October Term, 1940.

Martin M. Goldman, Petitioner, 962 *vs.* The United States of America. Jacob P. Shulman, Petitioner, 963 *vs.* The United States of America. Theodore Goldman, Petitioner, 980 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Murphy, dissenting.

I cannot agree for to me it is clear that the use of the detectaphone under the circumstances revealed by this record was an unreasonable search and seizure within the clear intendment of the Fourth Amendment.

One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment. In numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs.[1] It compensates him for trespass on his property or against his person. It prohibits the publication against his will of his thoughts, sentiments, and emotions regardless of whether those are expressed in words, painting, sculpture, music, or in other modes.[2] It may prohibit the use of his photograph for commercial purposes without his consent.[3] These are restrictions on the activi-

[1] See generally Brandeis and Warren, "The Right to Privacy", 4 Harv. L. Rev. 193 (1890).

[2] *Ibid.*, pp. 198-199.

[3] See Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68; Bazemore *v.* Savannah Hospital, 171 Ga. 257, 155 S. E. 194; Kunz *v.* Allen, 102 Kan. 883, 172 P. 532; Foster-Millburn *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Munden *v.* Harris, 153 Mo. A. 652, 134 S. W. 1076; Flake *v.* Greensboro News Co., 212 N. C. 780, 195 S. E. 55; Holloman *v.* Life Ins. Co. of

ties of private persons. But the Fourth Amendment puts a restraint on the arm of the Government itself and prevents it from invading the sanctity of a man's home or his private quarters in a chase for a suspect except under safeguards calculated to prevent oppression and abuse of authority.

On the value of the right to privacy, as dear as any to free men, little can or need be added to what was said in *Entick* v. *Carrington*, 19 How. St. Tr. 1030, *Boyd* v. *United States*, 116 U. S. 616, and Justice Brandeis' memorable dissent in *Olmstead* v. *United States*, 277 U. S. 438, 471. Suffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right. Insistence on its retention does not mean that a person has anything to conceal, but means rather that the choice should be his as to what he wishes to reveal, saving only to the Government the right to seek out crime under a procedure with suitable safeguards for the protection of individual rights, such as the warrant whose requisites are set forth in the Fourth Amendment.

It will be conceded that if the language of the Amendment were given only a literal construction, it might not fit the case now presented for review. The petitioners were not physically searched. Their homes were not entered. Their files were not ransacked. Their papers and effects were not disturbed. But it has not been the rule or practice of this Court to permit the scope and operation of broad principles ordained by the Constitution to be restricted, by a literal reading of its provisions, to those evils and phenomena that were contemporary with its framing. Cf. *Weems* v. *United States*, 217 U. S. 349, 373; *United States* v. *Classic*, 313 U. S. 299, 316.

The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide. It is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation. Cf. *Grau* v. *United States*, 287 U. S. 124, 128, and cases cited. Otherwise it may become obsolete, incapable of providing the peo-

Virginia, 192 S. C. 454, 7 S. E. 2d 169. Cf. Henry v. Cherry & Webb, 30 R. I. 13, 73 A. 97; Hillman v. Star Publishing Co., 64 Wash. 691, 117 P. 594; Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285; Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. 2d 972; O'Brien v. Pabst Sales Co., 124 F. 2d 167. See also § 51 of the New York Civil Rights Law.

ple of this land adequate protection. To this end we must give mind not merely to the exact words of the Amendment but also to its historic purpose, its high political character, and its modern social and legal implications.

With the passing of the years since 1787 marked changes have ensued in the ways of conducting business and personal affairs. Many transactions of a business or personal character that in the eighteenth century were conducted at home are now carried on in business offices away from the home. If the method and habits of the people in 1787 with respect to the conduct of their private business had been what they are today, is it possible to think that the framers of the Bill of Rights would have been any less solicitous of the privacy of transactions conducted in the office of a lawyer, a doctor, or a man of business, than they were of a person's papers and effects?[4]

There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment.[5] Surely the spirit motivating the framers of that Amendment would abhor these new devices no less. Physical entry may be wholly immaterial.[6] Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy

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[4] Papers taken from an office in the course of an unreasonable search are taken in violation of the Fourth Amendment. Silverthorne Lumber Co. *v.* United States, 251 U. S. 385; Gouled *v.* United States, 255 U. S. 298; Go-Bart Importing Co. *v.* United States, 282 U. S. 344; United States *v.* Lefkowitz, 285 U. S. 452.

[5] Those devices were the general warrants, the writs of assistance and the lettres de cachet.

On the subject of the general warrant see Entick *v.* Carrington, 19 How. St. Tr. 1030, and May, Constitutional History of England (2d ed.), vol. III, pp. 1-10.

For an account of the writs of assistance see Quincy (Mass.) 51 (1761) and Gray's appendix to Quincy's Reports. See also Tudor, James Otis, p. 66, and John Adams, Works, vol. II, p. 524.

The lettres de cachet are discussed in Chassaigne, Les Lettres de Cachet sous L'ancien Regime (Paris, 1903).

[6] "It is not the breaking of his [man's] doors and the rummaging of his drawers that constitutes the essence of the offense"—those are but "circumstances of aggravation". Boyd *v.* United States, 116 U. S. 616, 630.

of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment and equally call for remedial action.[7]

On the basis of the narrow, literal construction of the search and seizure clause of the Fourth Amendment adopted in *Olmstead* v. *United States*, 277 U. S. 438,[8] Government officials could well believe that activities of the character here involved did not contravene the Constitutional mandate. But for my part, I think that the *Olmstead* case was wrong. The error of the stultifying construction there adopted is best shown by the results to which it leads. It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters, thoughts perhaps too intimate to be set down even in a secret diary, or indeed, utterances about which the common law drew the cloak of privilege—the most confidential revelations between hus-

[7] A warrant can be devised which would permit the use of a detectaphone. Cf. Article 1, Section 12 of the New York Constitution (1938). And, while a search warrant, with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies (see Agnello v. United States, 269 U. S. 20, 32), some method of responsible administrative supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusions by Government officers. See Wigmore, Evidence (3d ed.), vol. 8, sec. 2184b, pp. 51-2.

While the detectaphone is primarily used to obtain evidence, and while such use appears to be condemned by the rulings of this Court in Gouled v. United States, 255 U. S. 298, and United States v. Lefkowitz, 285 U. S. 452, I am not prepared to say that this purpose necessarily makes all detectaphone "searches" unreasonable, no matter what the circumstances, or the procedural safeguards employed. Cf. United States v. Marron, 275 U. S. 192. See Wigmore, Evidence (3d ed.), vol. 8, secs. 2251, 2264; 31 Yale L. J. 518, 522; Chafee, Progress of the Law, 1919-1922, 35 Harv. L. Rev. 673, 699; 32 Col. L. Rev. 386; Cooley, Constitutional Limitations (8th ed.), vol. 1, p. 625.

[8] The Olmstead case limits the search and seizure clause to "an official search and seizure of his [defendant's] person or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." 277 U. S. 438, 466.

The decisions of this Court prior to the Olmstead case insisted on a liberal construction of the Fourth Amendment and placed within its compass activities bearing slight, if any, resemblance to the mischiefs known at the time of its adoption. See Boyd v. United States, 116 U. S. 616; Silverthorne Lumber Co. v. United States, 251 U. S. 385; Gouled v. United States, 255 U. S. 298.

band and wife, client and lawyer, patient and physician, and penitent and spiritual adviser. Nor can I see any rational basis for denying to the modern means of communication the same protection that is extended by the Amendment to the sealed letter in the mails. See *Ex parte Jackson*, 96 U. S. 727. Officers conducting an unreasonable search are seeking evidence as such; the form it takes is of no concern to them.

But even if *Olmstead's* case is to stand, it does not govern the present case. It was not the intention of petitioners to project their conversations beyond the walls of petitioner Shulman's private office.[9] Whatever may be said of a wire-tapping device that permits an outside telephone conversation to be overheard, it can hardly be doubted that the application of a detectaphone to the walls of a home or a private office constitutes a direct invasion of the privacy of the occupant, and a search of his private quarters.

The circumstance that petitioners were obviously guilty of gross fraud is immaterial. The Amendment provides no exception in its guaranty of protection. Its great purpose was to protect the citizen against oppressive tactics. Its benefits are illusory indeed if they are denied to persons who may have been convicted with evidence gathered by the very means which the Amendment forbids. Cf. *Weeks* v. *United States*, 232 U. S. 383. Its protecting arm extends to all alike, worthy and unworthy, without distinction. Rights intended to protect all must be extended to all, lest they so fall into desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need.

The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live.

[9] It also appears that the Government agents overheard Shulman's end of some outside telephone conversations.